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In the Supreme Court of the United States

OCTOBER TERM, 1934

Nos. 489–490

IN THE MATTER OF THE CHICAGO, ROCK ISLAND & Pacific Railway Company, Debtor

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RECONSTRUCTION FINANCE CORPORATION, PETITIONER

v.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY Company et al.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF OF PETITIONER, RECONSTRUCTION FINANCE CORPORATION

Respondents have filed three briefs in this case, which for convenience we shall refer to as follows:

(1) The brief filed on behalf of the Protective Committee for the debtor's First and Refunding Mortgage 4% Gold Bonds and Secured 4½% Gold Bonds, the Protective Committee for the Consolidated First Mortgage 5% Bonds of the Burlington, Cedar Rapids and Northern Railway Company, and the Protective Committee for debtor's 30-year

4½% Convertible Gold Bonds, as the *"brief for the Refunding Committee."*

(2) The brief filed on behalf of the Protective Committee for the General Mortgage Bonds of The Chicago, Rock Island and Pacific Railway Company, as the *"brief for the General Mortgage Committee."*

(3) The brief filed on behalf of the trustees of the debtor, as the *"brief for the trustees."*

All three briefs impliedly concede, first, that prior to the enactment of Section 77 of the Bankruptcy Act, the great weight of authority would have required the denial of an injunction such as was entered in this case; and, second, that Section 77 does not expressly confer on the court the right to grant this injunction. All briefs argue that the injunction can be justified on one narrow ground only, namely, that it was *necessary* (not merely convenient or expeditious) to issue this injunction in order to have *any* reorganization of the debtor in this proceeding. All the respondents reach this conclusion by arguing that Section 2, clause (15), of the Bankruptcy Act is sufficiently broad to empower the court to issue any order which is necessary to carry out the purpose of Section 77 of the Bankruptcy Act; that the sole purpose of Section 77 is to permit the reorganization of railroads; that any order which is necessary to accomplish such reorganization may be entered by the court under Section 2, clause (15); and that the injunction was necessary in this case to prevent a large increase in indebtedness, or in the number of

classes of creditors, which they assert would prevent a reorganization. The brief of the Refunding Committee likewise attempts to find authority for the injunction in Section 262 of the Judicial Code,[1] citing (brief of Refunding Committee, pp. 29–30) various cases decided thereunder, none of which have to do with a bankruptcy proceeding.

Although all three briefs agree that, on a showing that it was necessary in order to complete any reorganization, the order can be supported under Section 2 (15) of the Bankruptcy Act (the so-called "Omnibus Clause"), the briefs disagree, and are mutually inconsistent, in their explanations of the effect of a sale of the collateral, and as to the propriety of the injunction as to all the collateral held by the Reconstruction Finance Corporation.

On the first question, the brief for the Refunding Committee assumes[2] that purchasers of the collateral would acquire the same rights against

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[1] It should be noted that this is the first reference to Section 262 of the Judicial Code (28 U. S. C. A. 377) by any of the respondents, since none of them cited it in the courts below.

[2] In spite of an inconsistent argument on pp. 11 and 12 of their brief, this assumption must necessarily be inferred from the statement (brief of Refunding Committee, p. 6) that if all the collateral (including the collateral pledged under the three corporate indentures) is sold, claims will be expanded $200,000,000 (approximately the face amount of the collateral). Of course, if purchasers of certain of the pledged bonds (as the brief for the General Mortgage Committee contends) are not creditors for a deficiency on the collateral bonds, the swelling of claims will be considerably less.

the debtor as holders of bonds outstanding at the time of the bankruptcy, a position in which the brief for the trustees apparently agrees (brief for trustees, pp. 4, 34).

On the other hand, the brief for the General Mortgage Committee contends that purchasers of certain of the pledged bonds would not acquire the same rights as holders of bonds outstanding at the time of bankruptcy, but would acquire merely ratable shares in the distributive assets represented by the respective mortgages.

Before taking up these contradictory contentions, we desire to show how this case differs radically on the facts from the case of the five banks.

The brief of the General Mortgage Committee, which is the only brief that attempts a legal analysis of the different situations presented divides the Reconstruction Finance Corporation collateral into four groups (brief of General Mortgage Committee, pp. 8–10). We shall discuss these different groups in inverse order.

Fourth Group.—Collateral consisting of obligations of companies not involved in this bankruptcy proceeding.

The collateral in this group consists of $9,926,965.85 of bonds and an assignment of the principal debtor's share in certain assets of the

Railroad Credit Corporation estimated to have the value of $1,400,000.[3]

The General Mortgage Committee virtually admits that the injunction is in error as to all of this collateral. This admission appears on page 13 of the brief of the General Mortgage Committee where "ordinary collateral" is defined to mean "mortgage bonds or other securities which do not represent any interest in the estate or estates which the Court is administering", and where the following statement is made, viz:

> We do not understand that either in equity or in bankruptcy (*including Section 77 of the Bankruptcy Act*) a Court has the power to enjoin or control the sale by a pledgee of ordinary collateral. (Italics supplied.)

None of the collateral in this Fourth Group consists of mortgage bonds or other securities which "represent any interest in the estate or estates

[3] It should be noted that the only reference in the Circuit Court of Appeals' opinion to the claim against The Railroad Credit Corporation, comprised in the collateral held by the Reconstruction Finance Corporation, is the footnote reference (R. 316) in the opinion, that "$1,400,000 of the collateral given to R. F. C. was not bonds." The statement (brief of Refunding Committee, p. 24) of the Refunding Committee that the Reconstruction Finance Corporation was careless in saying in its brief (main brief of R. F. C., p. 13) that the Circuit Court of Appeals failed to note in its opinion that The Railroad Credit Corporation is a corporation entirely alien to the debtor or any of its subsidiary railroad companies, is unwarranted.

which the Bankruptcy Court is administering." The obligor companies are all companies not involved in this bankruptcy proceeding. Only one of the companies is wholly owned by the principal debtor. This one is not a railroad company. The other two companies, though railroad companies, are not operated as part of the principal debtor's operating system (brief of Refunding Committee, p. 24, footnote).

The endeavor of the Refunding Committee to uphold the injunction as to this collateral by calling it "system obligations" simply does not stand up under analysis. This Committee contends (brief, p. 24, footnote) that if this collateral is sold, it will cause the bankruptcy of the only one of the obligor companies, which is wholly owned by the principal debtor. Accordingly, we are led to infer that its properties will be part of the "estate or estates which the Court is administering." The point is that these obligor companies are *not* in bankruptcy and the court is *not* administering the properties on which these bonds are a lien. Whether or not bankruptcy will result for one of the companies if the bonds are sold is obviously only a surmise. We assume that this court will not care to venture into the field of economic prophecy.

Assuming for argument the correctness of the prevision in which the Refunding Committee indulges, the argument is one which neutralizes the assertion in its brief (brief of Refunding Committee, p. 10) that no plan of reorganization for the

debtor and its subsidiaries can be prepared until all possible classes of creditors involved in the proceeding and the amounts of claims in each class are definitely fixed. If the latter is a sound argument, then no parent company, like the principal debtor in the instant case, having numerous subsidiaries all with outstanding obligations, can be reorganized under Section 77, nor can even a plan of reorganization be drafted, until both the principal debtor and all such subsidiaries are joined in the debtor proceeding, so as to remove the possibility of a creation of new classes of claims which would come into being upon the filing by the subsidiaries from time to time, as permitted by subdivision (a) of Section 77, of petitions in the same bankruptcy proceeding.

Third Group.—Collateral consisting of bonds of companies which have been joined, in the instant bankruptcy proceeding with the principal debtor, which, however, has not guaranteed their bonds.

Comprised in this group of collateral are $7,258,000 face amount of bonds (the bonds of the Chicago, Rock Island & Gulf Railroad Co.), which it is admitted are neither guaranteed by the principal debtor nor are the properties subject to the mortgage liens, under lease to the principal debtor. The remainder, $2,306,000 face amount, are bonds of subsidiaries which likewise are not guaranteed by the principal debtor, but which, the General Mortgage Committee asserts, are liens on subsidiary

properties which are under lease to the principal debtor. (Brief of General Mortgage Committee, pp. 9, 10.) As a matter of fact, it appears of record (R. 92, 93) that these leases are *terminable at will,* except as to properties a mortgage on which is security for $100,000 of these bonds.

The obligor companies in this group are all companies which were joined in the bankruptcy proceeding after the petition for the injunction was filed with the District Court and while it was under advisement by that court (R. 97–99). Since none of the bonds are guaranteed, there is no way, *unless we are to disregard entirely the separate corporate entities of the principal debtor and its subsidiaries,* in which the sale of these bonds, if permitted, can increase the amount of claims outstanding against the principal debtor. In the case of the single lease that is not terminable at will, possibly there might be some increase under Section 77 in the amount of general claims if the trustees of the principal debtor, as they have the right to do, do not adopt the lease, but an increase of claims resulting from the nonadoption of this lease[4] is irrelevant to the issues presented in this litigation.

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[4] Under the provision contained in the last sentence of subdivision (b) of Section 77, future rent claimants are specifically made creditors "for all the purposes of this section and of the reorganization plan, its acceptance and confirmation." Under this provision, which for the same purposes defines "creditors" as "all holders of claims, interests, or securities of whatever character against the debtor

The brief of the Refunding Committee disingenuously suggests (brief of Refunding Committee, pp. 10, 24, and elsewhere) that the injunction should be supported as to this Third Group of collateral, because the obligor companies are subsidiaries of the principal debtor and hence their obligations are "system obligations."

The brief of the General Mortgage Committee (brief, p. 46), on the other hand, refers to the order of classification of the District Court (Appendix to R. F. C. brief, pp. 133–142), which does not provide separate classes for all the various issues of bonds in this Third Group. The short answer to this is that this order of classification is in error in not purporting to classify separately the claims against each of the several debtors in the instant multiple proceeding.[8] Suffice to say, the method of classifi-

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or its property * * * whether or not such claims, interests, or securities would otherwise constitute provable claims under this Act", it is clear that a pledged creditor such as the Reconstruction Finance Corporation is entitled to vote both on its notes and on the pledge securities; hence, there can be no swelling of votes if the collateral is sold (see pp. 20–26 of this brief, *infra*).

[8] It may not be out of place to remark that a hearing on a motion to amend the District Court's order of classification in another respect, not pertinent here, is now pending in the District Court in Chicago (hearing on petition No. 37 A in the instant reorganization proceedings, set for February 15, 1935). It should be noted that the order does not purport to be final since the court reserved jurisdiction to make "from time to time such further orders amplifying, extending, limiting or otherwise modifying" the order "as to the court may at any time seem proper." (Appendix, R. F. C. brief, p. 141.)

cation of creditors, which we suggest as the only correct method, has been adopted in the Missouri Pacific debtor proceeding under Section 77 (Order No. 234, entered Sept. 26, 1934, in the Missouri Pacific debtor proceeding).

The brief of the General Mortgage Committee admits (p. 41) that the District Court's order of classification is in error as is implied in the statement contained in that brief "that the trustees, as trustees of one estate, may have claims against another estate."

That this is so is beyond dispute. It is equally beyond cavil that regardless of the provision in subdivision (a) of Section 77 for a multiple proceeding, both the principal debtor and each of the subsidiaries, *unless we are to disregard the corporate entities,* must be treated as distinct corporations. Bonds of a subsidiary when negotiated to the parent company for value (the record, p. 13, shows that the bonds involved in this case were mostly issued at par in consideration of advances) are duly issued and outstanding regardless of whether or not they are (1) still held in the treasury of the principal debtor, (2) pledged by the principal debtor with pledgees, or (3) outstanding with the public. Unless this is so, the results would be inequitable and would violate the requirements of subdivisions (d), (f), and (g) of Section 77 for a plan of reorganization, as the General Mortgage Committee itself suggests (brief of General Mortgage Committee, p. 46).

Second Group.—Bonds of subsidiaries guaranteed by the principal debtor.

In the collateral held by the Reconstruction Finance Corporation there are only two bond issues of this character, $9,374,500 face amount of St. Paul and Kansas City Short Line First Mortgage Bonds and $3,862,000 face amount of Rock Island, Arkansas and Louisiana First Mortgage Bonds (brief of General Mortgage Committee, pp. 8–9).

What we have heretofore said in regard to respecting separate corporate entities applies with equal force as to these bonds. They differ from the negligible face amount ($100,000) of bonds in the Third Group of companies under long-term lease, also, in the feature of a guaranty by the principal debtor.

In our main brief (main brief of R. F. C., pp. 93 and 94) we insisted, and insist here again, that there can be no "increase in the debt structure" by the sale of any of the bonds in Groups Fourth, Third, and Second. This is indisputable, unless, as demonstrated above, *separate corporate entities are to be disregarded.* As with the bonds in Group Fourth and Third the bonds in Group Second are corporate issues, issued under corporate indentures with acting corporate trustees. If, as the General Mortgage Committee contends (which we dispute), the guaranty by the principal debtor of the bonds in Group Second is not enforcible by pledges of the bonds, it is enforcible by the cor-

porate trustees, forthwith upon the bankruptcy of the principal debtor (see *Maynard* v. *Elliott,* 283 U. S. 273) such trustees are required, under the terms of the corporate indentures under which they are acting, to act for all bonds authenticated and outstanding under said indentures, whether or not the bonds were issued for purposes of pledge, or were issued outright to holders.

Incidentally, it should be noted that the $9,374,-500 face amount of St. Paul and Kansas City Short Line First Mortgage Bonds, pledged with the Reconstruction Finance Corporation, are part of a single issue of which $9,981,940 face amount of the balance are outstanding with the public; and that likewise the $3,862,000 face amount of Rock Island, Arkansas and Louisiana First Mortgage Bonds similarly pledged are part of a single issue of which the remaining $11,000,000 face amount are outstanding with the public. In each case both the pledged bonds and the bonds outstanding with the public were issued under the same corporate indenture and the interests of the holders are represented by the same corporate trustees (White and Kemble's Atlas and Digest of Railroad Mortgages, corrected to July 1932, division on The Chicago, Rock Island and Pacific Railway Company, pp. 1, 8–9).

Each of the companies obligated on bonds comprised in the Reconstruction Finance Corporation collateral is *a separate corporate entity,* having its

own creditors (general and/or secured), its own separate board of directors, its own staff of officers, and its own separate contractual relationships. Unless these legal relationships are to be ignored, the mere fact that either (1) all or part of their stock (the record is silent on this point, and we have no means of knowing which of the companies are wholly owned) is owned by the principal debtor, except for directors' qualifying shares; or (2) some of these companies are under lease to the principal debtor (the leases being either terminable at will or capable of nonadoption by the trustees of the principal debtor); or (3) some of their bond issues are guaranteed by the principal debtor; affords no legal basis for a disregard of the separate corporate entities concerned. Bankruptcy of one or more of these concerns cannot, under any theory of law of which we are aware, have this effect.

Unless corporate entities are disregarded there can be no "increase in debt structure" resulting from the sale of the bonds of other companies pledged with Reconstruction Finance Corporation. The injunction appealed from is clearly in error as to such bonds. With a minor exception,[6] all of the collateral held by Reconstruction Finance Corporation consists of such bonds except $7,575,000 face amount of bonds of the principal debtor.

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[6] The claim against The Railroad Credit Corporation.

First Group.—$7,575,000 face amount of bonds of the principal debtor.

As to these bonds, the argument of the General Mortgage Committee, viz, that the holders of the pledged bonds have only a ratable share in the mortgaged assets and are not entitled to prove in bankruptcy *on the face amount of their bonds,* is unsupported by the authorities.

The bankruptcy cases of *First National Bank of Beaumont* v. *Eason,* 149 Fed. 204; *John Matthews, Inc.,* v. *Knickerbocker Trust Co.,* 192 Fed. 557; and In re *Wise Shoe Co.,* 2 Fed. Supp. 521; and the equity cases of *Union National Bank* v. *People's Savings & Trust Co.,* 28 F. (2d) 326; In re *Waddell-Entz Co.,* 67 Conn. 324; *Third National Bank* v. *Eastern Railroad Company,* 122 Mass. 240; and *People* v. *Remington,* 54 Hun 480, upon which the General Mortgage Committee relies, all have to do with situations where unsecured notes of the debtor had been pledged to secure the same debtor's unsecured note. In such cases, as shown in our main brief (main brief of R. F. C., pp. 34, 45, 46, footnote 3), the courts have considered that unsecured notes of the same debtor do not in commercial parlance constitute "collateral." A pledgee holding unsecured notes of a bankrupt does not have a lien within the meaning of Section 67 (d) of the Bankruptcy Act and is not entitled to the rights afforded by Section 57 (h) of the Act. Since

it is under these sections that a pledgee in possession of "collateral" is entitled to sell collateral, cases involving pledge of unsecured notes, such as those cited in the General Mortgage Committee's brief have no application whatever in the instant case. In the case of *In re Battle Island Paper Co.*, 259 Fed. 921, also relied upon by the General Mortgage Committee to support their position, the exact holding of the court, regardless of the language of the opinion, which is somewhat confusing, was that a creditor holding pledged bonds could not have a general claim against the unmortgaged assets of the debtor for deficiency both on the bonds and the notes. As is shown by the case, the court permitted a claim for deficiency on the bond collateral after the creditor had received a distributable share of the assets of the mortgaged property. In other words, the court allowed a deficiency claim to be proved on the *bonds,* which certainly does not support the proposition for which the case is cited by the General Mortgage Committee. In *Hitner* v. *Diamond State Steel Co.,* 176 Fed. 384, upon which the General Mortgage Committee also relies, there was no injunction against the sale of collateral involved. The question was merely one of provability under the equity rule (different from that in bankruptcy) which permits a claim on the total debt before the liquidation. The language of the opinion is adverse to the General Mortgage Committee's

contention, since the court implied (p. 399) that a sale of the collateral (consisting of the insolvent's own bonds) would have been proper, and a purchaser would have acquired full rights on the bonds.

The *dictum* of the Court in the *Dibert* v. *D'Arcy,* 248 Mo. 617 (the only other case relied upon by the General Mortgage Committee), condemning a pledgee's power of sale was wholly *obiter,* but by reason of the emphatic position taken by the Court in this equity case, the opinion has been accepted as the law in Missouri. Obviously, the holding here has no authority outside that jurisdiction, and has been expressly repudiated in a recent case. *Gilbert* v. *Fosston Mfg. Co.,* 174 Minn. 68, 80, 81; 218 N. W. 451.

The effective answer to the argument of the General Mortgage Committee is that a secured bond consists of more than merely a promise and an unrelated lien. What the holder owns is a piece of property, an amalgam of the promise with the lien. In this respect, the situation is the same with bonds validly issued outright, and bonds validly pledged. And there is no proper distinction between a pledge by a corporation of its own bonds and a pledge by it of the bonds of other corporations. The pledgee, as holder, has an assignable piece of property. Having possession, he can maintain an action for conversion. *Carter* v. *Lehman,* 90 Ala. 126. Furthermore, he has an undeniable right to repledge; *Brown* v. *Spofford,* 95 U. S. 474;

Brooklyn, etc., R. Co. v. *National Bank,* 102 U. S. 14. The pledgee is, together with other holders of bonds on the same issue, a tenant in common of the mortgage. In all these respects the thing, of which the pledgee has possession, is something quite different from an unsecured note.

It necessarily follows that, if the contention of the General Mortgage Committee is sustained by this Court, the marketability after bankruptcy of pledged bonds of the same debtor will be destroyed. Where other bonds of the same issue are outstanding, obviously two kinds of bonds of a same issue will be created, those entitled to full bondholder's rights, and those which represent merely a ratable share in the mortgaged assets. Not to mention the practical difficulties where the issue is a large one with stock exchange listing, the economic consequences will be serious. Since railroads, because of charter and statutory restrictions, ordinarily cannot engage in general lines of business, the only type of collateral which they can usually offer a bank, or other money lender, are bonds of the company itself or its subsidiaries or affiliates. A holding by this Court, such as suggested by the General Mortgage Committee, will gravely cripple railroad corporations in the short-term money market.

In its brief the Refunding Committee makes only two affirmative points. These points will be answered in the same order.

I

THE INJUNCTION IN THE INSTANT CASE IS NOT NECESSARY FOR THE ENFORCEMENT OF THE PROVISIONS OF SECTION 77, SINCE LEAVING THE COLLATERAL FREE FOR SALE WILL NOT PREVENT THE CONSUMMATION OF A PLAN OF REORGANIZATION.

As heretofore discussed, the General Mortgage Committee contends that, in case of a sale of the pledged bonds of the principal debtor, the purchasers obtain only a ratable share in the assets secured by the mortgages. On the other hand, the Refunding Committee takes an inconsistent view that a sale of the collateral would swell claims to the extent of the full face amount of the pledged bonds, less any proceeds of the sales (brief of Refunding Committee, p. 6). The Refunding Committee, in saying that the proceeds of the sales "would be relatively small" (brief of Refunding Committee, p. 6), and that a sale of the collateral held by the banks and the Reconstruction Finance Corporation (*plus* the collateral held under the three corporate indentures) would swell claims to the extent of $200,000,000, would seem to be unduly pessimistic in view of the following facts:

(1) Approximately $33,000,000 of the $200,000,000 amount consists of capital stock (brief of Refunding Committee, pp. 5–6), the sale of which would not swell claims at all; and

(2) the remainder of the collateral, or the bulk of it, consists of first-mortgage liens, the value of

which, even in a time of depression, is considerable[7]; and

(3) since proceeds received by the pledgees on a sale, in excess of the amount of the pledgees' claims against the debtor, belong to the debtor's estate and would have to be returned to the trustees for the debtor, the maximum amount by which claims might be "swelled" might conceivably be reduced to only a fraction of the $200,000,000 figure which the Refunding Committee is so alarmed about.

Be that as it may, we submit that the matters are irrelevant to the issues here involved. The argument of the Refunding Committee on the point is without support in the law.

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[7] A detailed description of the collateral held by the banks and the Reconstruction Finance Corporation appears in the brief of the General Mortgage Committee (brief of General Mortgage Committee, pp. 8–10), but none of the respondents include in their briefs any description of the collateral subject to the respective liens of the three corporate indentures. Besides the stock already mentioned, such collateral appears to consist of the following: $38,400,000 face amount of General Mortgage Bonds of the principal debtor (a first lien) and miscellaneous bonds constituting a first lien on various subsidiaries, up to a total of $66,495,000 face amount of bonds, pledged with the trustees for the principal debtor's First and Refunding Mortgage; $45,000,000 face amount of the principal debtor's First and Refunding Mortgage Bonds pledged with the trustee for the principal debtor's Secured 4½ percent Bonds; and $1,365,000 face amount of First Mortgage Bonds on a subsidiary pledged with the trustees of the principal debtor's General Mortgage (White & Kemble's Atlas and Digest of Railroad Mortgages, corrected to July 1932, section on The Chicago, Rock Island and Pacific Railway Company, pp. 4–6).

A

FOR THE PURPOSES OF SECTION 77 AND OF THE REORGANIZATION PLAN, ITS ACCEPTANCE AND CONFIRMATION, PLEDGEES ARE CREDITORS BOTH IN RESPECT OF THEIR NOTES AND IN RESPECT OF PLEDGED BONDS.

In our main brief (main brief of R. F. C., pp. 91–92) we quoted and discussed the provision contained in the last sentence of subdivision (b) of Section 77, which reads as follows:

> The term "creditors" shall, except as otherwise specifically provided in this section, include, for all purposes of this section and of the reorganization plan, its acceptance and confirmation, all holders of claims, interests, or securities of whatever character against the debtor or its property, including claim for future rent, whether or not such claims, interests, or securities would otherwise constitute provable claims under this Act.

We likewise quoted the same provision in the brief accompanying the Reconstruction Finance Corporation's petition for writs of certiorari, which was allowed by this Court. The respondents in their answering brief to the petition ignored this statutory provision, and in their briefs filed with this Court in the instant case have failed to give effect to the language. The brief of the trustees (brief of the trustees, p. 43) states that Reconstruction Finance Corporation's position that it is entitled to vote both on its notes and on the pledged collateral is a "novel" one.

It is an accepted canon of statutory construction that effect must be given to the express words of a statute. From the above statutory provision it is plain that "for all purposes of Section 77 and of the reorganization plan, its acceptance and confirmation", a pledge creditor, whether or not prior to the enactment of Section 77 he could prove both on his notes and on the pledged securities, must be regarded as a creditor both in the class of secured note holders and in the various classes in which the pledged securities are included. It is significant that under the above-quoted provision and under the similar provision contained in Section 77B relative to corporate reorganizations (fifth sentence of subdivision (b) of Section 77B) claimants for future rent constitute "creditors", although prior to the enactment of these acts they did not have provable claims in bankruptcy.[8]

If the pledge is a valid one, someone is entitled to vote upon the pledged bonds. As between the pledgor and the pledgee, the pledgee has this right until the loan has been fully repaid.

Unless the right is accorded the pledgee, he has no greater voice in the approval or disapproval of

[8] Regardless of what the rule may have been as to provability of claims in ordinary bankruptcy, clearly subdivision (b) of Section 77 has operated as an amendment with respect to proceedings under Section 77. See discussion of corresponding provision in Section 77B in Friendly, *The Corporate Reorganizations Act*, (1934) 48 Harvard Law Review, 39, 62. But see reference to effect of Section 74 in *Manhattan Properties, Inc.*, v. *Irving Trust Co.*, 291 U. S. 320, 336, 337.

a plan than an unsecured noteholder. The injury which may result to a pledgee unless he is allowed a vote on the pledged bonds may readily be illustrated. For instance, the plan of reorganization eventually evolved in the instant proceeding may merely provide for the extension of the notes held by the banks and the Reconstruction Finance Corporation, or, in other words, their conversion into a collateral trust issue. Are we to say that in such a case the pledgee is to have no voice in determining the terms and provisions of the underlying securities but is to be required to accept that which is acceptable to committees for the underlying classes, whose interests may be conflicting? In many cases the holders of the underlying securities now held by the Reconstruction Finance Corporation are so scattered and inarticulate that they haven't even a committee representation.

The above-quoted provision of subdivision (b) of Section 77, the language of which the respondents have ignored in their briefs, furnishes an effective answer to their contention that leaving the collateral free for sale creates an "insuperable mechanical difficulty" (brief of Refunding Committee, p. 14) to the preparation and consummation of a plan of reorganization. The total amount of bonds or stock of each issue which must be dealt with in a reorganization is the aggregate principal amount outstanding at the date the petition is filed, including bonds or stock legally issued and out-

standing on that date in the hands of pledge creditors.

If effect is given to the express language of the statute the mechanical difficulty referred to by the respondents disappears. In reckoning what constitutes the vote of two-thirds of any one class of creditors there must be counted all bonds lawfully outstanding, including bonds validly in the possession of pledgees. The same method must be used in determining what constitutes 10 percent of a class entitled under the first sentence of subdivision (d) of Section 77 to present a plan of reorganization. Respondents emphasize unduly their contention. The only other situation in which Section 77 calls for taking a percentage of security holders is the provision of subdivision (a) of Section 77, which permits creditors "having claims or interests aggregating not less than 5 per centum of all indebtedness of such railroad" to file an involuntary petition. Although Section 77 was approved March 3, 1933, this provision has proved of academic importance since all the petitions which have been filed under Section 77 up to date have been voluntary petitions of the respective debtors (see main brief of Reconstruction Finance Corporation, pp. 102–104, footnote 40).

The respondents' contention, if followed up, produces absurd results. If it is indeed true that pledge creditors must be enjoined from selling their collateral before the amount of securities in each class is definitely determined, obviously an injunction

will have to be granted in the case of every railroad reorganization under Section 77 where there are outstanding bank loans or loans from the Reconstruction Finance Corporation. Since the Reconstruction Finance Corporation has made loans to most of the major roads which are now under Section 77, or are likely to file under Section 77, this means the Reconstruction Finance Corporation must be restrained from enforcing its pledge contract in each one of these proceedings. The respondents' contention that the instant case is an unusual one calling for a unique employment of the residuum of power granted to bankruptcy courts by the so-called "Omnibus Clause" (Section 2 (15)) of the Bankruptcy Act becomes a little thin. If full effect is given to respondents' contention, such injunctions must be continued in force throughout the tortuous length of the proceedings until a plan of reorganization has finally been submitted to the Commission, recommended by it, approved by all the various classes of security holders, and confirmed by the court.

Again, it is true that in every reorganization, whether a Section 77 proceeding or an equity receivership, the claims of general unsecured creditors are never definitely fixed. Uncertainty as to the exact amount of these claims, on the other hand, creates no practical difficulty to reorganization. In asserting that no plan can be formulated until the exact amount of claims in each class is ascertained, (brief of General Mortgage Committee, p. 10)

the respondents do not approach the problem realistically. We are confident that this Court will construe Section 77 with a view to pragmatic results, giving effect to all the express language thereof.

The illustrations of the respondents (brief of Refunding Committee, pp. 12–13; brief of General Mortgage Committee, p. 37) of the supposedly inequitable results that might flow from according pledgees votes both on their notes and on their collateral are based on a concealed premise that the pledges are invalid and that the pledgees are not entitled to representation in accordance with their financial and contractual interest. They also assume that the power to vote will be used to accomplish inequitable or fraudulent results. For the point for which they are cited, they are no more convincing than an instance where holders of more than two-thirds of the stock also owned two-thirds or more of a single issue of mortgage bonds, which precedes the stock. Pushed to its logical conclusion, the respondents' contention would deny a vote to stockholders, who are also bondholders, for fear that the common voting power might be used to oppress the minority bondholders. The effective answer in each case is that unless we are to disregard the express language of the statute, dual voting must be allowed in both situations. Under subdivisions (d), (f), and (g) of Section 77, neither can the Interstate Commerce Commission approve a plan of reorganization, nor can the court confirm it without findings that the plan is "equitable" and

does not "discriminate unfairly in favor of any class of creditors or stockholders." These subdivisions are designed to block any proposed plan of reorganization which is inequitable.

B

FREEDOM TO SELL THE COLLATERAL WILL EXPEDITE RATHER THAN RETARD REORGANIZATION.

This point was fully covered in our main brief (Reconstruction Finance Corporation brief, pp. 96–100), to which we again refer the Court. None of the respondents has as yet made any effective answer to the matters therein discussed. As shown in our main brief (Reconstruction Finance Corporation brief, pp. 102–104, footnote 40), although Section 77 was enacted nearly two years ago, the characteristic of the proceedings thereunder has been the slow rate of progress made. This condition will continue unless creditors can exert leverage to bring about a compromise of conflicting claims.

The contention of the Refunding Committee (brief of Refunding Committee, p. 12) that the "collateral would have to be recognized in quite a different way if it was sold from the way it will be recognized if it is retained", when analyzed, is based on the here overt premise that no effect should be given to the terms of the pledge contract. This is merely to assume the point at issue. In other words, the pledge creditor should have a no greater bargaining position in a reorganization than an unsecured one, who under the provisions of

subdivisions (e), (f), and (g) of Section 77 is likewise entitled to a voice in the approval or disapproval of a plan.

As a matter of fact, the validity of all the pledge contracts involved in this case is admitted by all the parties. The bonds involved are "collateral" in both commercial and legal parlance. Moreover, they were issued under corporate indentures containing carefully drawn provisions regulating the issuance of bonds and designed to prevent any overissue, such as the courts have had to deal with in the cases involving security consisting of the multiplication of a personal debtor's unsecured promises. In accordance with the terms of those corporate indentures, they bear the authentication of corporate trustees who have certified that the bonds are part of the limited issues provided for in the corporate indentures. Furthermore, in the case of issues since the effective date of the Transportation Act of 1920, they bear the stamp of approval of the Interstate Commerce Commission which, under Section 20a of the Interstate Commerce Act, since that date has had the duty imposed upon it of approving the security issues of carriers subject to the Interstate Commerce Act.

In case of some of the issues, bonds of the same issue are held by public holders who acquired their bonds with notice of the terms of the corporate indenture, including specifically the restricted permission to issue further bonds, upon

the terms and conditions therein set forth, either for purposes of pledge or to direct purchases. It is a little late for the committees representing bondholders to attempt to negative the pledge with the Reconstruction Finance Corporation (as upholding this injunction will do) as security for loans made by the Government, which went in part to pay interest on the very bonds (see Appendix, pp. 28, 29, 70) represented by some of the committees which have urged this injunction. The time to have objected was before the pledges were made, when the applications for the loans were before the Interstate Commerce Commission and the Reconstruction Finance Corporation, for action by those governmental agencies, respectively. To recognize the contention now is to deprive pledgees of their contract rights for the benefit of bondholders, who became such under mortgage contracts which permitted the issuance and pledging of additional bonds. Furthermore, the effect of sustaining the contention now will tend to retard rather than expedite reorganization.

C

AS SHOWN IN OUR MAIN BRIEF THE FINDINGS OF THE DISTRICT COURT UPON WHICH THE ORDER WAS PREDICATED ARE UNWARRANTED ASSUMPTIONS; AND THE CASE WILL BE DETERMINED UPON ITS MERITS BY THIS COURT

As shown in our main brief (main brief of R. F. C. pp. 89–100) the findings upon which the order of the District Court are predicated are unwarranted assumptions.

Under the circumstances this Court will determine this case on its merits.

Smith v. *Vulcan Iron Works,* 165 U. S. 518, 525;

In Re *Tampa Suburban Railway Co.,* 168 U. S. 583;

Mast Foos & Co. v. *Stover Mfg. Co.,* 177 U. S. 485, 494, 495;

Harriman v. *Northern Securities Company,* 197 U. S. 244, 287;

U. S. F. & G. Co. v. *Bray,* 225 U. S. 205, 214;

Denver v. *New York Trust Co.,* 229 U. S. 123, 136.

D

A DECISION HOLDING THAT THE PETITIONERS ARE FREE TO SELL THEIR COLLATERAL WILL NOT ALSO DETERMINE THE RIGHTS OF THE CORPORATE TRUSTEES UNDER THREE OF THE PRINCIPAL DEBTOR'S CORPORATE INDENTURES.

Obviously, the terms of the principal debtor's corporate indentures differ from the terms of the notes held by the pledgees; the collateral pledged under the former (a substantial part of which consists of stock) is not the same as the collateral involved in this case; and, though the respondents refer ambiguously to the bonds pledged under the three mortgages as "system obligations", there is no proof under which of the four groupings of the General Mortgage Committee it falls (brief of General Mortgage Committee, pp. 8–10), or whether it falls under some other grouping.

Apart from the realistic aspects,[9] a decision in this case cannot determine the rights of the mortgage trustees with respect to the collateral held by them. The latters rights can only be adjudicated in a proceeding where the terms of the contracts, the application of the legal principles involved, and the character of the collateral are at issue.[10]

II

THE UNPROVED PREMISE OF RESPONDENTS' WHOLE ARGUMENT IS THAT SECTION 77 OF THE BANKRUPTCY ACT HAS WIPED OUT THE DISTINCTION BETWEEN PROPERTY IN POSSESSION OF THE DEBTOR, AND PROPERTY OUTSIDE ITS DOMINION. THERE IS NO BASIS FOR THIS ASSUMPTION AND RESPONDENTS' WHOLE ARGUMENT FALLS.

Respondents' argument, when subjected to analysis, really assumes the point at issue; and, having done so, respondents proceed to demonstrate that the injunction against sale of collateral was properly issued.

The point at issue is whether under the terms of Section 77, a court may reach beyond the property in the immediate dominion of the bankrupt. Courts have consistently held, heretofore, that this could not be done. We do not understand this to be disputed. Courts have likewise held that a

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[9] Discussed *infra* at pp. 38–39 of this brief.

[10] We desire to point out that statement, made in our main brief (main brief of R. F. C., p. 31) has been misconstrued by the Refunding Committee (brief of Refunding Committee, p. 41), given quite a different implication, that we concede that in spite of the provisions of subdivision (1) of Section 77, the court has power to enjoin the sale of the collateral held by the trustees of the three mortgages.

pledge creditor differed from an unsecured creditor in that—

> for practical purposes the pledgee has * * * immediate dominion * * * and with it goes the power to resist any action by the bankruptcy court, which must be founded on the fact that the bankrupt had such dominion when the petition was filed. (Learned Hand, J., in re *Hudson River Navigation Corporation*, 57 F. (2d) 175.)

The jurisdiction of a bankruptcy court has been thus limited to the property of the debtor under his dominion when the petition was filed. This entailed a sharp distinction between creditors who were unsecured (as in the case of *John Matthews, Inc.* v. *Knickerbocker Trust Co.*, 192 Fed. 557),[11]

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[11] It should be noted in this connection that the Refunding Committee ineffectually attempts to dismiss *In re Ironclad Mfg. Co.*, 192 Fed. 318 (brief of Refunding Committee, p. 33) as not being authority for the proposition that the sale of collateral consisting of *secured* bonds of the bankrupt will not be enjoined. The decision in this case was by the Second Circuit which one month prior had decided *John Matthews* v. *Knickerbocker Trust Co.*, 192 Fed. 557. It is indisputable that the Second Circuit had the *Matthews* case in mind at the time of the decision in the *Ironclad* case, as may be seen from the following time table:

***John Matthews* v. *Knickerbocker Trust Co.*, 192 Fed. 557:**	
Petition to revise, filed in C. C. A.	Sept. 21, 1911
Briefs for petitioner, Knickerbocker Trust Co. filed.	Oct. 24, 1911
Briefs for respondents filed	Nov. 2, 1911
Decision handed down	Dec. 11, 1911
***In re Ironclad Mfg. Co.*, 192 Fed. 318:**	
Petition to revise, filed in C. C. A.	Oct. 16, 1911
Briefs for unsecured creditors filed	Oct. 24, 1911
Briefs for respondents filed	Nov. 3, 1911
Decision handed down	Jan. 8, 1912

and whose right to recover depended solely on their share in the hotchpot, as contrasted with creditors who held property withdrawn from the hotchpot.

In the *Ironclad* case, the briefs used, which are on file for general reference in the library of the Bar Association of the City of New York, show that counsel discussed the *Matthews* case in their briefs, and distinguished the bonds in the former as "ordinary debenture bonds and not lien bonds, secured by property of the corporation, as are those in controversy" (Brief of respondents Philadelphia Warehouse Co. et al., p. 10). Counsel also stated in their brief (brief of respondent McKeesport Tin Plate Co., p. 9) "both of these cases (Matthews case & First Nat. Bank v. Eason, 149 Fed. 204) are to be distinguished from the present case because in * * * the present case the bonds pledged were bonds secured by a mortgage on property." The Refunding Committee has completely missed the point of the case. It is not that the decision rests "on a mistaken view of the holding of *Jerome* v. *McCarter*, 94 U. S. 734" (Refunding Committee Brief, p. 33)—but on the contrary (*a*) the Second Circuit either overruled the *Matthews* case *sub silentio* (see, Glenn, *Creditors Rights and Remedies* (1915), Sec. 545) or (*b*) considered the two cases as so obviously distinguishable that extended opinion was deemed unnecessary.

The above explanation is of particular significance in view of the contention of the respondents in the instant case (brief of General Mortgage Committee, p. 51, brief of Refunding Committee, p. 32) that the *Ironclad* case is the only case supporting the petitioners' right to sell their collateral. Relative to this remark, it should be observed:

(a) In *Jerome* v. *McCarter*, 94 U. S. 734, which the respondents attempt to discredit (brief of General Mortgage Committee, pp. 49–50, brief of Refunding Committee, p. 33) by showing that the case came to this Court, during the pendency of a bankruptcy proceeding, on an appeal from an equity foreclosure, this Court flatly stated that pledgees have a clear right to use pledged bonds, "either by sale or collection, until the full amount of the debt due from the mortgagors is satisfied." Though the exact point decided

The English term for this latter class, " outside creditors ", is both apt and descriptive. Pledge creditors under the bankruptcy law prior to Sec-

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in the case was merely that the trustee of a mortgage had a right to foreclose on the debtor's equity of redemption, over the objection of the debtor's assignee in bankruptcy, who had been joined as a party defendant in the equity suit, the assignee in bankruptcy whose position thus was not sustained, had set up, among other things, as an assignment of error on the appeal, that the holders of some of the bonds, for whose benefit the suit was instituted, had originally been held in pledge, and that the sale thereof by the pledgees *after* bankruptcy had been invalid. So the court expressly sustained the right of a pledgee to sell his collateral, consisting of the corporation's own secured bonds, notwithstanding bankruptcy of the pledgor. In part, at least, in reliance upon the authority of the *McCarter* case and of the *Ironclad* case, literally hundreds of millions of dollars of now outstanding collateral loans to railroads and other corporations have been made (for figure as to loans to railroads, see main brief of Reconstruction Finance Corporation, p. 75). The endeavor of the respondents to discredit the *McCarter* case, as an *equity* case, while in their own argument, relying on such equity cases as *Hitner* v. *Diamond State Steel Co.* and *Dibert* v. *D'Arcy* (this brief, *supra*, pp. 15–16), is disingenuous, to say the least.

(b) Though not so qualified by the respondents, obviously, the remark can only be intended to apply to the $7,575,000 principal amount of the principal debtor's own bonds. As to the remaining collateral, which as heretofore shown (*supra*, pp. 4–14) consists of obligations of other corporations, the whole weight of authority supports the petitioners' position. (See main brief of Reconstruction Finance Corporation, pp. 32–44.)

(c) Perhaps, one reason why there have not been more cases involving the right of a pledgee to sell after bankruptcy pledged collateral, consisting of the bankrupt's own *secured* bonds, is that the right, up to the instant case, has rarely been questioned. It is significant that all of the cases upon which

tion 77 have been consistently held to be in that class. And rightly so; for the precise quality of pledge is the segregation of property from the hotchpot, and the granting of credit to the debtor in reliance upon that very segregation.

There is hardly a pretense that the terms of Section 77 abrogate in terms this ancient and common-sense line. In fact, Section 77 by its terms carried the old line forward. No other sound construction can be given to Subdivision (n) of Section 77, providing that—

> * * * the jurisdiction and powers of the court * * * with respect to the debtor and his property, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the debtor's petition was filed.

The Congress might have undertaken to set up a different line of demarcation; but it elected in definite language to carry forward the interpreta-

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the respondents mainly rely involve either *unsecured* notes, which in commercial and legal parlance is not "collateral" (see this brief, *supra*, p. 14), or cases involving not injunctions, but questions of provability. In the latter category are *Hitner* v. *Diamond State Steel Co.* and *Dibert* v. *D'Arcy;* and *In re Battle Island Paper Co.* (discussed in this brief, *supra*, pp. 15–16). Only the last of these is a bankruptcy case.

(d) Thus, the respondents have failed to cite a *single* case, involving an injunction, which supports their contention on the issue involved. *Mississippi Valley Trust Company* v. *Railway Steel Spring Company*, 258 Fed. 346 (an *equity* case) (R. F. C. main brief, pp. 34, 43, 44) involved an injunction against the sale of the debtors' secured bonds.

tion worked out under the existing Bankruptcy Act, basing it upon the powers of the court over property held by a debtor who had voluntarily asked an adjudication, and had secured it. Nothing has yet been said indicating that a different rule was to be arrived at.

Nor, we believe, is respondents' case strengthened by an endeavor to confuse the issue by referring to cases in which, under the Bankruptcy Act prior to Section 77, courts had held that creditors who claimed segregation did not, in fact, have it. In the brief filed by the Refunding Committee (brief of Refunding Committee, pp. 26, 27) sixteen cases are cited as authority for the proposition that section 2 (15) has been applied in a wide variety of ways. Respondents carefully neglect to point out that in only two of these cases were injunctions against the sale of collateral involved. Of these, *In re Purkett, Douglas & Co.*, 50 F. (2d) 435, involved a temporary injunction pending determination of whether transfer to the pledgee was in violation of the usury laws. The case is direct support for the petitioners contention that where the pledgee has possession of the bonds under a valid pledge, the bankruptcy court has no jurisdiction over him. In the *Matthews* case the injunction was granted after the court had determined that the creditor in question did not hold collateral, but held a claim against the hotchpot, and was seeking not to retain something outside the debtor's property, but to seize and take over something

within the debtor's estate, or to seize and take over a claim primarily directed against the hotchpot of the debtor's estate. The distinction is aptly illustrated by the case of *Mississippi Valley Trust Company* v. *Railway Steel Spring Company*, 258 Fed. 346, 351, in which the court determined that under the law of Missouri an apparent pledgee was in fact a fiduciary of the pledged property for the debtor; and the case of *Allebach* v. *Thomas*, 16 Fed. (2d) 853, where a mortgagor, not in possession, sought by enforcing his mortgage, to withdraw property from the hotchpot. The other fourteen cases cited by respondent are so out of point as not to warrant serious consideration.[12]

The line between property within the immediate dominion of the debtor and property removed from it was, of course, in some instances difficult to draw. Under the Bankruptcy Act prior to 1933, whose provisions are so specifically carried forward in Section 77, courts had drawn a common-sense rule. Roughly, they dismissed mere

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[12] For the convenience of the Court the questions involved in the remaining fourteen cases may be grouped under the following brief headings:

(*a*) Injunctions against the commencement of judicial proceedings in other courts after the bankruptcy court has taken possession of the property; or against judicial proceedings begun in other courts within four (4) months of bankruptcy. *White* v. *Schloerb; In re Kletchka; Moorhouse* v. *Giant Powder Company; In re Swofford, etc., Co.; Mitchell Storebuilding* v. *Carroll; In re Donnelly; In re Hornstein.*

unsecured claims as "property" capable of being segregated from the hotchpot. Rightly so, for these claims meant nothing except as they represented an ultimate, distributive share in the hotchpot. Argument is made (brief for Refunding Committee, p. 34) that refusal to allow debtors to segregate *unsecured* claims opens a gate. The argument is based on no express power granted to the court by Section 77. It is further said that if the property segregated includes an obligation of the debtor, then it cannot be truly

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(*b*) Injunction preventing the removal of property from the jurisdiction of the court after bankruptcy. *In re Consumers, etc., Co.*

(*c*) Injunction against proceedings in a state court pending determination of the bankrupt's right to a discharge. *In re Nuttall; In re Van Buren.*

(*d*) Injunction to prevent a municipality from penalizing a bankrupt. *In re Hicks.*

(*e*) Injunction to prevent the working of a fraud through a legal technicality. *In re A. Musica & Son.*

(*f*) Cases involving the authority of a Bankruptcy Court to make rules in regulating practice before it (1) prohibiting trustees in bankruptcy to retain as their attorney the attorney of the bankrupt or for the petitioning creditors, unless specially authorized by the court, *Weil* v. *Neary;* or (2) limiting the time within which claims against the debtor's estate can be filed. *New York* v. *Irving Trust Co.*

In addition to these fourteen cases, respondents cite *In re Collier*, 4 F. Supp. 700, in which the court stayed a judgment creditor of a debtor under section 74 from prosecuting a suit in the state courts against an indemnity company, which had furnished an appeal bond to the debtor. The decision went upon the theory that the judgment debt was provable under section 74 and hence would be discharged by the confirmation of a plan of a proposed composition under the section.

segregated. The old line, of course, had definitely been drawn between secured obligations of the debtor as being capable of isolation, and unsecured obligations which were not. The theory behind that common-sense distinction is plain. The pledgee of an instrument which carries the obligation of a debtor, and which pledged obligation is otherwise secured, holds not merely the debtor's promise to pay, but also a tenancy in common in the security for that promise. This made the pledged obligation not only a *promise,* but a *thing;* and it was treated as a separate thing in the markets and in commerce.

It is argued (brief for Refunding Committee, p. 35) that perhaps the pledged obligation might be only colorably secured; what then? The case is put of a mortgage obligation for $20,000 resting on property having a value of $1,000, the mortgage being then pledged. It is sufficient answer to say that the courts may be trusted to deal with colorably secured obligations under pledge, as the court did, in a similar situation, in the case of *In re Purkett, Douglas & Co., supra;* no claim has been made in this case that the secured obligations of the debtor here pledged fall within that class.

And, of course, that argument simply does not apply to the bulk of the security pledged with the Reconstruction Finance Corporation, which are not obligations of the debtor, but obligations of other concerns, some solvent concerns, some operated separately, and all separate corporate entities.

A more realistic argument—indeed the only valid position—is taken by the trustees in bankruptcy. In their brief (page 9) they rest squarely on the theory that a railroad reorganization is peculiar; that all of the railroad creditors of any class and kind ought to be held in abeyance pending the existence of a plan; and that Section 77, construed in the light of the general railroad situation, ought to take in a vastly larger territory than that embraced in the previous bankruptcy sections. We can understand this position; it is logical. It is merely regrettable for the trustees' position that the statute not only did not embody that theory, but in terms negatived it. The trustees present a dream of what Congress might have done. They even suggest that perhaps it should have been done under the commerce clause of the Constitution, rather than under the bankruptcy clause (brief for trustees, page 8). It is debatable whether Congress ought to have done this; it is not open to question that they did not do so.

Lacking case law or statutory warrant, counsel for the Refunding Committee, in the principal argument, are reduced to the naked argument *ex necessitate*. It will be difficult, they say, to work up reorganization plans if there are large amounts of pledge creditors who can sell pledged obligations. This argument, of course, applies only to direct obligations of a debtor which are pledged for the debtor's own notes. Illogical extension of it is,

however, sought to include securities of other companies. Even if necessity could make law, the argument, taken at its face, without analysis, is not persuasive. For it is likewise urged that this case will be and must be a precedent to permit an injunction preventing the trustees under collateral trust deeds from selling the security pledged behind the debtor's outstanding collateral trust bonds. Indeed, this apparently is one of the chief objectives sought to be reached, by the Trustees in Bankruptcy, and by the Refunding Committee.

Yet collateral trust deeds securing obligations of a railroad are familiar; the Court will perhaps take judicial notice of the fact that they have been a usual medium of railroad financing for many years. Railroads have gone through receivership reorganization with such collateral trust issues outstanding, and never has injunction against the sale of the collateral been found necessary to effect a reorganization. The danger, therefore, that a plan cannot be worked up is not new; the assertion that it becomes impossible to draw a plan of reorganization is gratuitous. Plans have been drawn and made effective in similar circumstances without benefit of injunction;[13] nothing is alleged to

[13] For instance, in the last St. Paul reorganization a collateral trust issue of about $14,000,000 General Collateral Gold 6's of 1934, issued in 1924, and secured by $20,000,000 of the same debtor's General Mortgage Gold Series D 5's of 1989, was not foreclosed, but remained outstanding throughout the reorganization until paid at maturity. The plan of reor-

indicate a different situation in the instant reorganization proceeding.

The argument that the loans of the Reconstruction Finance Corporation, though originally short-term credit operations, have by force of circumstance become virtually long-term loans analogous to mortgage bonds which have no standing except as they are a claim on a hotchpot, is scarcely worthy of serious consideration. Changing circumstance cannot vary the direct word and agreement of the debtor to segregate certain collateral to the possession of Reconstruction Finance Corporation, coupled with actual segregation and permission in the note to Reconstruction Finance Corporation to sell that collateral without judicial proceedings. Because the agreement now becomes inconvenient, that clause of the notes executed by the debtor permitting sale should not be repudiated.

Respondents likewise would give no effect to the express provision of Section 5 of the Reconstruction Finance Corporation Act, empowering it to take over and liquidate collateral.[14]

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ganization did not alter the terms and conditions of the General Collateral Gold 6's, though some modification was made in the underlying collateral. This reorganization also illustrates the unreality of the Refunding committee's contention, since most of the St. Paul mortgages (as do those of the Rock Island) constituted liens not only on physical properties, but also on various stocks and bonds.

[14] The Refunding Committee has entirely misconstrued (its brief, p. 48) the position set out in our main brief (main brief of Reconstruction Finance Corporation, pages 65–69)

We revert to the terms of Section 77. It drew the old line in carrying forward by subdivision (n), the familiar distinction between property within and property without the dominion of the debtor—the distinction which Judge Learned Hand so clearly drew in the *Hudson River Navigation* case (57 F. (2d) 175). It did more. It delimited the power of the court. In Subdivision (1) is granted power to the court to stay a judicial proceeding to enforce a lien. Rightly, the respondents urge that this deals only with legal proceedings. It would be more to the point if attention could be called (it

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in regard to this provision. We there contended (as we here reassert) that the statutory provision in question contained in Section 5 must be construed in *pari materia* with the provisions of Section 77; and that the derivation of power to grant the injunction from the so-called "Omnibus Clause" of the Bankruptcy Act, couched in *general* language, should not prevail over a power *expressly* granted by the Congress to the Reconstruction Finance Corporation. Obiously the illustration used by the Refunding Committee, the foreclosure of a mortgage by Reconstruction Finance Corporation, requiring judicial proceedings, which the District Court has *express* power to stay under Section 77, is not apposite. Likewise, we freely concede that exercise of the statutory power by Reconstruction Finance Corporation would be subject to all the requirements of due process and review thereof by the courts. Furthermore, it would seem that the provision in question in Section 5 of the Reconstruction Finance Corporation Act cannot lightly be dismissed as a mere incidental charter power without reference to the design of the Congress, viz., the protection of public funds. It is absurd to analogize the powers of the Reconstruction Finance Corporation, a government instrumentality, with those of other than strictly governmental agencies.

cannot be) to a grant of power to interfere with the *jus disponendi* of a holder of segregated property. And nowhere is there any suggestion contained in the statute that the familiar provisions of Section 67 (d) of the Bankruptcy Act protecting liens given in good faith, or of 57 (h) under which pledgees are protected in their right of sale, have been overridden.

III

LACKING THE PREMISE THAT PLEDGED PROPERTY IS NOW WITHIN THE ESTATE OF THE DEBTOR, THE ORDER WAS IMPROPER EITHER IN SUMMARY OR PLENARY PROCEEDINGS.

First. The failure to show inclusion of segregated property in the debtor's estate disposes of the contention that an injunction can be summarily made.

Summary proceedings, as we understand them, are allowed to prevent interference with the debtor's estate. Thus, they are resorted to to prevent legal proceedings which would withdraw property from the hotchpot; or which would multiply claims against the hotchpot; or which would permit determination of claims in a court other than the bankruptcy court.

But it is quite one thing to say that a court may summarily protect its own property (*Cf. Isaacs* v. *Hobbs Tie & Timber Co.*, 282 U. S. 734); it is quite another to say that it may summarily reach out and possess itself of property in the immediate dominion of others (*Cf. Straton* v. *New*, 283 U. S. 318). In the first case, the summary order acts

as a shield. In the second, it would be a sword. The Refunding Committee substantially admits that the summary order in the case at bar is a sword by stating that if the injunction is upheld, when and if the collateral is sold, effect will have to be given to it "in a very different way" than if it is retained (brief of Refunding Committee, p. 12). Naturally, the Refunding Committee would prefer that pledged creditors should sink to the status of claimants against the hotchpot; that is to say, of unsecured creditors; or at least of creditors the nature and priority of whose claim on the hotchpot is no longer determined by the agreement but is to be determined by someone else.

The instant proceeding cannot be viewed other than as a genuine attempt to alter the right of the petitioner, in contravention not only of its contract, but of its physical dominion. As such it is a litigation [15] between adverse parties.[16] The fail-

[15] The respondents advance a somewhat unique theory of litigation: that this is not a "dispute between private litigants" and that respondents are merely unholding the hands of the Federal District Court in its effort to administer a reorganization proceeding. Incidentally, this suggestion is urged most vigorously by the committees representing junior bond issues rather than by the General Mortgage Committee whose position in the reorganization is relatively secure, whatever the outcome of this litigation. If respondents are not acting as adversaries in the case at bar their participation can be justified only on the ground that they are functioning as *amicus curiae*. This argument, however, is not available, since the Refunding Committee has taken upon itself the management of the instant cause. It is ele-

ure of the Refunding Committee to grasp the true nature of the proceeding is shown by its failure to observe the difference in position of a mortgagee

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mentary that such a course is not open to *amicis curiae*. See *In re Columbia Real Estate Co.*, 101 Fed. 965, 970 (1900); *Birmingham Loan & Auction Co.* v. *First Nat. Bank of Anniston*, 100 Ala. 243, 13 S. 945, 946 (1893); *Martin* v. *Tapley*, 119 Mass. 116, 120 (1875); *Taft* v. *Northern Transportation Company*, 56 N. H. 414, 416 (1876); *In re Pina's Estate*, 112 Cal. 14, 44 Pac. 332, 333 (1896); *Parker* v. *State*, 133 Ind. 178, 33 N. E. 119, 122 (1892).

That the District Court recognized the adverse economic interests (R. 40, 42) of respondents in this case is clearly evidenced by the fact that its injunctional order was predicated upon the precise contentions advanced by the affidavit presented in behalf of this Refunding Committee. Moreover, if the District Court had not considered the issues presented by respondents' affidavit to be such as to involve a "case or controversy", it would not have invoked its judicial power for the purpose of issuing the injunctional order. (See, Hughes, Federal Practice, Jurisdiction and Procedure (1931) sec. 242). Even if respondents' disingenuous contention that they are not adversaries could be sustained, the argument that a court of bankruptcy, prior to the presentation of a reorganization plan, may perform administrative duties, comparable to such instrumentalities as the Interstate Commerce Commission or the Federal Trade Commission, is constitutionally fatal. For the assumption of such duties by a judicial organ is in direct conflict with the well-established doctrine that constitutional courts, created under art. 3 of the Constitution, may not perform functions which are purely administrative or legislative in character. See *Hayburn's* case, 2 Dall. 409 (U. S. 1792); *United States* v. *Ferreira*, 13 How. 40 (U. S. 1851); *Gordon* v. *United States*, 2 Wall. 561 (U. S. 1864); *Keller* v. *Potomac Electric Power Co.*, 261 U. S. 428 (1922); *Postum Cereal Co.* v. *California Fig Nut Co.*, 272 U. S. 693 (1927); *Butterworth* v. *Hoe*, 112 U. S. 50 (1884); *Federal Radio Commissioner* v. *General Electric Co.*, 281 U. S. 464 (1930); *In re Canada No. Ry.* v.

who has a lien which he may assert later, from that of a pledgee who holds property which he has already withdrawn. It also appears from the contention that the injunction is necessary to the continued operation of the debtor's estate (brief of the Trustees, p. 6).

International Bridge Co., 7 Fed. 653 (N. D. N. Y. 1880), 8 Fed. 190 (N. D. N. Y. 1881). See also *Tutun* v. *United States*, 270 U. S. 568, 576 (1926). *Contra: Harrison* v. *Moneravie*, 264 Fed. 776 (C. C. A. 8th, 1920). See also *Wallace* v. *Adams*, 204 U. S. 415, 423 (1907); and Katz, Federal Legislative Courts (1930), 43 Harv. L. Rev. 894).

[16] A bankruptcy court has no summary jurisdiction with respect to rights asserted by adverse claimants. *Mueller* v. *Nugent*, 184 U. S. 1, 15; *Louisville Trust Co.* v. *Comingor*, 184 U. S. 18, 24; *Jacquith* v. *Rowley*, 188 U. S. 620, 623; *Schweer* v. *Brown*, 195 U. S. 171, 172; *Galbraith* v. *Vallely*, 256 U. S. 46, 48; *Taubel*, etc. *Co.* v. *Fox*, 264 U. S. 426, 433; *May* v. *Henderson*, 268 U. S. 111, 115. Thus, in *Harrison* v. *Chamberlin*, 271 U. S. 191, this Court said (p. 193):

"It is well settled that a court of bankruptcy is without jurisdiction to adjudicate in a summary proceeding a controversy in reference to property held adversely to the bankrupt estate, without the consent of the adverse claimant; but resort must be had by the trustee to a plenary suit."

In a plenary proceeding the necessary allegations for the issuance of an injunction must be made out in the petition for the injunction, and omissions may not be supplied by a supporting affidavit. *Missouri Pacific R. R. Co.* v. *Norwood*, 283 U. S. 249, and other cases cited in our main brief (pp. 25–27). The Refunding Committee (brief of Refunding Committee, pp. 52–54) has entirely misconstrued the position taken in our main brief (pp. 25–27). The point we made was that a plenary proceeding was necessary against the banks and the Reconstruction Finance Corporation, and in such a proceeding, omissions from the debtor's petition (R. 37) could not be supplied by a supporting affidavit.

Change of claims upon the property in possession of the debtor, occasioned by the fact that secured obligations of the debtor are pledged underneath these loans, will not change the physical status; will not disrupt the railroad; will not, in fact, alter any physical assets within the possession of the court or of the trustees in bankruptcy.

Second. Upon analysis, the alleged power of the court to make the order even in plenary proceedings breaks down. There is a great gulf fixed between power to enforce a right which the debtor or his estate may have to possession, in order that property belonging to the hotchpot may be recovered for it; and power to alter the right of a creditor to maintain property free of the hotchpot. Even the respondents do not suggest that property has been wrongfully removed from the hotchpot which should be replaced in it. They seek to achieve the same result, it is true, by immobilizing that property so that the pledged creditors can do nothing with it. This is merely a negative method of securing a positive result. The right to dispose of property is the highest right connected with it; delete that right, and in substance the property has been tied to the debtor's estate.

Contrast this with the care which courts have used in analogous situations. In *Allebach* v. *Thomas,* 16 F. (2d) 853, the court restrained a mortgagee from foreclosing in a State court; but it did so on the express ground that he had an equally efficient and adequate remedy in the bank-

ruptcy court itself; the forum had been changed, but not the right.

During an emergency a state statute may postpone the exercise of a remedy such as the right to foreclose judicially, provided there is protection of the creditor's right to receive interest (*Home Building and Loan Association* v. *Blaisdell,* 290 U. S. 398). It is conceivable that a statute *might* have been drawn treating the right of a pledgee to sell as the equivalent of a foreclosure, and working out some method of postponing this self-help remedy. It is sufficient to say that here no such statute *was* drawn; and the drastic nature of such a statute and the difficulty of sustaining it, when enacted, is perhaps reason enough why this court should not be asked to construct it out of vague suggestions *ex necessitate.*

IV

SECTION 77 IS AN INTEGRAL PART OF THE BANKRUPTCY ACT AND THERE IS NO JUSTIFICATION FOR RESPONDENTS' ATTEMPT TO IGNORE OTHER APPLICABLE SECTIONS.

The respondents insist, with different degrees of emphasis, that various express provisions of Section 77 do not apply to proceedings under Section 77.

The provisions for reorganization contained in Section 77 are an elaboration of the "composition" section,[17] familiar to American bankruptcy pro-

[17] C. 390, 18 Stat. 183. See *Wilmot* v. *Mudge* (1880), 103 U. S. 217; *Canada Southern Railway Company* v. *Gebhard,* 109 U. S. 527 (1883); Dunscomb, S. W., *Bankruptcy: A Study in Comparative Legislation* (1893) at 147–148.

cedure since 1874. The attempt on the part of counsel for the trustees to separate Section 77 from the Bankruptcy Act is reminiscent of similar efforts on the part of counsel before this Court in connection with the composition section of the Bankruptcy Act of 1874. In the case of *Wilmot* v. *Mudge,* 103 U. S. 217, Mr. Justice Miller, speaking for the Court, had occasion to discuss counsel's contention that the composition section was not a part of the proceedings under the then Bankruptcy law (p. 219):

> Next, it is said that the 17th section of the Act of 1874, which provides for this composition, is not *in pari materia* with the bankrupt law, and is a new and independent mode of distributing the bankrupt's assets, and releasing him from his debt, and is not a part of the proceedings under the bankrupt law.
>
> We do not understand that there is any power in the debtor to invoke this remedy until proceedings in bankruptcy have been commenced by him or against him under the bankrupt law.
>
> Nor can the District Court make the necessary order establishing the composition, except in a case of regular bankruptcy proceedings, either voluntary or involuntary. The composition proceeding is, therefore, a part of the proceedings in bankruptcy, and is one of the modes, which the bankrupt law authorizes, of releasing the debtor and securing to his creditors an equal share of his means.

> The section itself is one of many amending the bankrupt law in numerous particulars, and is declared to be an amendment of section 43 of the original Act of 1867.
>
> We are very clear, therefore, that the provision for composition is a proceeding in bankruptcy under the Bankrupt Act, whether reference be had to the language of the Act of 1867 or of the Revised Statutes, that debts created by fraud shall not be discharged under it. See opinion of Chief Justice Waite, In re *Holmes & Lissberger,* 15 Blatchf. 170.

The same problem was again brought before this Court in the case of *Cumberland Glass Co.* v. *De Witt,* 237 U. S. 447, in connection with the Act of 1898, where Mr. Justice Day, speaking for the Court, said (p. 453):

> * * * the composition proceedings arise from the bankruptcy proceedings, and this part of the statute is to be construed with the entire act. *Wilmot* v. *Mudge,* 103 U. S. 217.

By an amendment to the Bankruptcy Act in 1910,[18] it was provided that a bankrupt might offer terms of composition either before or after adjudication. Thus, prior to the recent amendments to the Bankruptcy Act, for twenty-five years a corporation (not otherwise barred by Section 4 of the Act) has been privileged to avail itself of

[18] C. 541, Section 12, 30 Stat. 549; C. 412, Section 5, 36 Stat. 839.

the composition sections and procure assistance from the bankruptcy court in effecting a settlement with creditors providing that the corporation would concede its insolvency.

Since the decision in *Wilmot* v. *Mudge, supra,* the proposition that compositions are proceedings in bankruptcy under the Bankruptcy Act and are to be construed in *pari materia* with the entire Act has never been questioned. Therefore, *a fortiori,* it is indisputable that Section 77 must be construed in *pari materia* with the entire Act,[19] and

[19] The rule of statutory construction applied by this Court in the *Wilmot* case, *supra*, leaves no doubt as to the soundness of this premise. We quote Mr. Justice Miller's language (p. 220):

"The rules of construing statutes in like cases with the present are so well understood as to require no citation of authorities.

"They are, first, that effect shall be given to all the words of a statute, where this is possible without a conflict; and, second, that as regards statutes in *pari materia* of different dates, the last shall repeal the first only when there are express terms of repeal, or where the implication of repeal is a necessary one. When repeal by implication is relied on, it must be impossible for both provisions under consideration to stand because one necessarily destroys the other. If both can stand by any reasonable construction, that construction must be adopted." In the October 1933 term, this Court again reaffirmed this long-standing judicial construction in the case of *Manhattan Properties* v. *Irving Trust Co.*, 291 U. S. 320. To the argument urged on the Court that the established rule with respect to the provability of claims under Section 63 (a) of the Bankruptcy Act had been changed by the sections added to the Act in 1933, Mr. Justice Roberts, speaking for the Court, replied (p 336):

this would be equally true, were there no such express provision as is set forth in subdivision (n) of Section 77.

V

ANALOGY IN ENGLISH REORGANIZATION PROCEDURE

The respondents assert that the injunctional order was "necessary." It may be illuminating, therefore, to examine respondents' theory of *ex necessitate* against the background of English reorganization procedure.

Since 1867 it has been the statutory policy of the Parliament to provide reorganization facilities for embarrassed and insolvent railway companies through machinery substantially similar to Section 77.[20] Under the provisions of the Railway Company's Act, the court is specifically empowered to stay litigation, such as creditors' suits or executions.[21] But this "unusual and extraordinary"

"In this situation (only compelling language in the statute itself would warrant the rejection of a construction so long and so generally accepted). *Maynard* v. *Elliott*, *supra* (283 U. S. 277, 75 L. ed. 1031, 51 S. Ct. 390, 17 Am. Bankr. Rep. (N. S.) 501). If the rule is to be changed, Congress should so declare."

[20] See, for statutory provisions, *Railway Companies Act, 1867*, 30 & 31 Vict. c. 127; 23 Halsbury's Laws of England (ed. 1912), 768–771. It is to be noted that the plan or "scheme" is filed simultaneously with the company's declaration that it "is unable to meet its engagements with its creditors." Ibid. Section 6.

[21] Ibid. Sections 7 and 9. But c. Point II, main brief, pp. 55–60.

power may be resorted to "only for the period between the filing and enrollment of the scheme." [22] In other words, the purpose underlying the English Act is to protect the assets of a company in the interval *after* a plan has been filed with the court and *until* the requisite assents have been obtained.[23] Thus, in the absence of a plan of reorganization, as in the case at bar, the English courts would not, in the first place, be empowered to grant an injunction and, secondly, would dismiss arguments such as learned counsel for respondents have advance in behalf of the injunction as academic. Moreover, under the English procedure even after a plan has been filed an injunction will not be granted, if in the judgment of the court, the plan would not "afford a reasonable prospect of providing for the payment of the claims of the creditors and thus *compensate them for a temporary suspension of their remedies.*" [24] However, on the novel theory which has been advanced by the several respondents, not only may valid claims of

[22] See *In re Potteries, Shrewsbury, and North Wales Railway Company*, 5 Ch. App. 67, 71 (1869).

[23] Sir G. M. Gifford, L. J., in *In re Potteries, Shrewsbury, and North Wales Railway Company, op. cit. supra note 22*, at 72: "I am convinced that this power was only given to the Court to enable the company to protect its property pending the scheme, if there was a reasonable expectation of obtaining the requisite assents."

[24] *In re Cambrian Railway Company's Scheme*, 3 Ch. App. 278 (1868), at 299, italics supplied.

pledge creditors be "suspended" indefinitely, but a court of bankruptcy need not even determine, when granting an injunction, whether or not a plan will adequately "compensate them [pledge creditors] for a temporary suspension of their remedies." Indeed, in Section 77 proceedings, on respondents' theory, a reorganization plan need never be presented;[25] having filed a petition, the debtor, "within the sheltering haven of an injunction, may simply wait—this at the expense of the creditor."[26] If it is to be the law of the land that the filing of a petition for reorganization, Section 77 "freezes" (see, especially, Trustee's brief, p. 9; Refunding Committee brief, pp. 9–17) the contract rights of creditors to dispose, pursuant to the terms of a pledge contract, of pledged collateral validly in their possession, then it is respectfully submitted that such a rule of law should not be laid down by this Court but only by the Congress.

In reply to respondents' suggestion that the petitioners have an equally efficient and adequate

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[25] See main brief, Point V, pp. 101–102.

[26] See our main brief, Point IV, p. 97 *et seq.* *Cf.* Hough, J., dissenting in *Manhattan Rubber Mfg. Co.* v. *Lucey Mfg. Co.*, 5 F. (2d) 39, where the expression is used of a debtor's "sitting under the Chancellor's umbrella and watching the weather outside."

remedy (see *Allebach* v. *Thomas*, 16 F. 2d, 853, 855), may we suggest that Section 77 is an experimental statute. From the slow rate of progress made thereunder (see main brief of Reconstruction Finance Corporation, pp. 102–104, footnote 40), it remains to be seen whether it will prove a workable statute and an effective instrument for accomplishing the end for which it was designed, the reorganization of railroad corporations. The Federal Coordinator of Transportation has recently called attention to the fact that the Act contains "defects and deficiencies." He has further said, referring to Section 77: "That statute plowed new ground and, as might have been anticipated, its authors did not foresee all the difficulties and perplexities which would be encountered in its actual operation." [27]

Under the composition section of the Bankruptcy Act (Section 12),[28] which is the prototype of Section 77, few, if any, corporations of importance have been reorganized. So far as we have been able to discover in all the years that a composition provision has been a part of the Bankruptcy Act, no case has even arisen involving an injunction against the sale of pledged collateral.

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[27] I Report of Federal Coordinator of Transportation on Transportation Legislation (1935), 57.

[28] Under this section a composition cannot be confirmed until after the plan has been accepted by "a majority in number of all creditors whose claims have been allowed."

The suggestion that the petitioners have "an equally efficient and adequate remedy" by the provision for a plan of reorganization in Section 77, and that pending the final effectuation of such a plan they may be indefinitely stayed from enforcing their contract rights, is warranted by nothing expressly in Section 77 itself and is, furthermore, unrelated to realities.

VI

ECONOMIC CONSIDERATIONS.

We took occasion to observe in our main brief (R. F. C. brief, pp. 71–73), that the effect of the injunctional order would be virtually to immobilize in the control of a corporate debtor all its holdings even though pledged and subject to the right of sale, and would perpetuate indefinitely the control of the debtor corporation. Apparently, counsel for the Refunding Committee are not inclined seriously to dispute this view, but rather urge it as an economic consideration for upholding the ruling of the District Court and of the Circuit Court of Appeals.

Somewhat naively it is suggested that the policy of the Government has been in the direction of railroad consolidations (brief of Refunding Committee, p. 69). Assuming that this is true (if it is so, it has been honored more in the breach than in the observance), the policy of the Government has never been one of sanctifying consolidations or con-

centrations in the railroad field *merely because they happen to exist.* To the contrary, the railroad administrative policy has occupied itself as much with breaking up uneconomic, senseless or monopolistic combinations as in the holding together loose aggregations born of stock purchases or other casual acquisitions.[29] Even when such aggregations are tied to the principal railroad through the mechanism of collateral trust issues, there has been no indication that the policy of the Government was to perpetuate them indefinitely. This argument, for example, might lead to the forced protection (under the provisions of Sec. 77–B) of the entire so-called Van Sweringgen system, held through a series of holding companies dominated by the Allegheny Corporation.

Nothing could show more clearly the evil of the situation than the argument of the Refunding Committee. This explains their inability to preserve the distinction between pledges of property not connected with the debtor, pledges of securities owned by the debtor but which are not debtor's obligations, and pledges of obligations of the debtor secured by liens or claims on other property; and the reason why they are anxious to prevent any rearrangement which might occur should collateral

[29] For instance: the divorce of the Pennsylvania Railroad from the Wabash; the New York, New Haven & Hartford R. R. from the Boston & Maine R. R., etc.

trust bondholders ask their trustees to assert the right of sale.

Actually respondents' fears are financial rather than for the integrity of railroads. A railroad need hardly fear that its system will be broken up in an unwarranted way, even though stock of a constituent subsidiary might be sold. If the property of that subsidiary belongs in that system, its greatest value lies there. If it can be easily divorced from the system, or made more valuable by integrating it into another system, that very fact raises the question as to whether the divorce should not be seriously considered. In any case, the Interstate Commerce Commission now has jurisdiction to permit or forbid acquisition of control by other railroad interests.[30] Divorce without reintegration either in the principal system or some similar system is unthinkable. The property thus lopped off would at once lose value, no matter how strategic its location, how heavy the density of the traffic it carries, or how important to the transportation line it may be.

The judgments of the Circuit Court of Appeals should be reversed and the causes remanded to the District Court with instructions to vacate the injunctional order (R. 104), and so much of the

[30] The Interstate Commerce Act, U. S. C., Title 49, Sec. 5 (6).

order (R. 7) approving the debtor's petition under Section 77 as denies to this petitioner the right to dispose of the pledged collateral pursuant to the terms of the debtor's notes held by it.

Respectfully submitted.

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